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IN THE

Supreme Court of the United States.

October Term, 1906.

No. 180.

THE UNITED STATES, *Appellant,*

v.

DONN C. MITCHELL.

APPEAL FROM THE COURT OF CLAIMS.

Brief for Appellee.

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THE UNITED STATES, *Appellant*,
v.
DONN C. MITCHELL. } No. 180.

Appeal from the Court of Claims.

BRIEF FOR APPELLEE.

I. Statement of the Case.

This is a suit by an officer of Troop E, First Regiment Ohio Cavalry Volunteers in the War with Spain, for one month's extra pay on honorable discharge and muster out from the service. (Petition, Record p. 1.)

Statutes Providing Extra Pay.

The claim arises under the following provisions:

Act of January 12, 1899 (30 Stat. L. 784)—

An Act Granting extra pay to officers and enlisted men of United States Volunteers.

Be it enacted, etc., That in lieu of granting leaves of absence and furloughs to officers and enlisted men belonging to companies and regiments of United States Volunteers prior to muster out of the service, all officers and enlisted men belonging to volunteer organizations hereafter mustered out of the service who have served honestly and faithfully beyond the limits of the United States shall

be paid two months' extra pay on muster out and discharge from service, and all officers and enlisted men belonging to organizations hereafter mustered out of the service who have served honestly and faithfully within the limits of the United States shall be paid one month's extra pay on muster out and discharge from the service, from any money in the Treasury not otherwise appropriated:

Provided, That the discharge of all officers and enlisted men from the volunteer service of the United States shall, as far as practicable, take effect on the date of the muster out of the organization to which they belong, and that regiments and other independent organizations shall be mustered out at camps within the limits of the United States or at the rendezvous of the State, regiment or independent organization.

Act of May 26, 1900 (31 Stat. L. 217)—

That the Act approved January 12th, 1899, granting "extra pay to officers and enlisted men of the United States Volunteers," shall extend to all volunteer officers of the general staff who have not received waiting orders pay prior to discharge, at the rate of one month to those who did not serve beyond the limits of the United States and two months to those who served beyond the limits of the United States;

and officers and enlisted men of volunteer organizations, who have served honestly and faithfully in the Volunteer Army of the United States during the War with Spain and have been honorably discharged without furlough, or by reason of their services being no longer required, or at any time by reason of wounds received, or disability contracted in the service and in the line of duty, and who have not received the extra pay granted in said Act or in subsequent Acts of Congress supplemental thereto:

And this Act shall be deemed to apply to officers of volunteers who resigned and enlisted men of volunteers who were discharged upon their own applications subsequent to the issue of orders for the muster out of their organizations and prior to the dates of muster out.

Only Question is as to Amount.

The Court of Claims finds (Finding IV, pp. 4, 5) that the claimant was held for duty during the period of thirty days from September 14, 1898, during which his regiment was nominally on furlough. He was thus "discharged without furlough" and was therefore held entitled to extra pay under the act of 1900.

It is conceded in the brief for the United States (top p. 5) that "he is entitled to extra pay, and the only question for this court to consider is the amount to which he is entitled."

This question depends upon the rank in which the extra pay should be calculated.

Service as Second Lieutenant.

The claimant, Donn C. Mitchell, was enrolled in the Volunteer Army during the Spanish War, as second lieutenant of Troop E, First Ohio Volunteer Cavalry, on the 3d day of May, 1898. (Finding I, Record, p. 2.)

Service as First Lieutenant.

He served in the grade of second lieutenant until promoted to first lieutenant October 20, 1898. He was mustered out as first lieutenant October 23, 1898. His entire service was within the limits of the United States. (Finding I, Record, p. 2.)

Service as Captain.

While on duty as second lieutenant of the First Ohio Volunteer Cavalry at Huntsville, Ala., during the Spanish War, claimant received the following order:

"HEADQUARTERS 1ST OHIO VOLUNTEER CAVALRY,
"CAMP WHEELER, HUNTSVILLE, ALA.,
"Special Orders } "*August 24, 1898.*
"No. 44. }

"I. 1st. Lieut. William D. Forsyth, 1st Ohio Volunteer Cavalry, having been ordered before a board for examination for appointment as second lieutenant in the Regular Army, is hereby relieved of the command of Troop E. He will turn over the property, funds and records of the troop to his successor.

"II. 2nd Lieut. Donn C. Mitchell, 1st Ohio Volunteer Cavalry is hereby appointed to the command of Troop E. He will receipt to Lieut. Forsyth for the property and funds pertaining to the troop.

"By order of Lieut. Col. Day: A. C. RODGERS,
"*Captain and Regtl. Adj. 1st Ohio Vol. Cav.*"

This order was approved by the commanding general in the field in the following orders:

"HEADQUARTERS FOURTH ARMY CORPS,
"CAMP WHEELER, HUNTSVILLE, ALA.,
"Special Orders } "*September 2, 1898.*
No. 97. }

* * * * * * *

"II. It appearing from evidence that the following-named officers of the First Ohio Volunteer Cavalry have exercised the functions of commanders above that pertaining to the grades held by them from and after the dates set opposite their respective names, the assignment thereto contemplated by General Orders, No. 86, current series, Adjutant-General's Office, is confirmed, namely:

* * * * * * *

"2nd Lieut. Donn C. Mitchell, as captain, from August 24th, 1898.

* * * * * * *

"By command of Major-General Coppinger:
"CLARENCE K. EDWARDS,
"*Assistant Adjutant General.*"

Under these orders claimant exercised command of Troop E from August 26, 1898, to October 23, 1898, when he was mustered out with his regiment. (Finding II, Record, pp. 2, 3.)

At the time that he assumed and during the time that he exercised command of Troop E he was the senior officer present with the troop. (Finding II, Record, p. 4.)

Rate of Pay Received for Service.

From August 26, 1898, to October 19, 1898, claimant was originally paid the rate due a second lieutenant of cavalry and from October 20 to October 23, 1898, he originally received the pay of a first lieutenant of cavalry. He subsequently filed a claim for additional pay for command of the troop and was paid by the Auditor for the War Department, October 30, 1899, the pay of a captain for the entire period from August 26, 1898, to October 23, 1898. (Finding III, Record, p. 4.)

This action was based upon the provision of the Act of April 26, 1898, 30 Stat. L. 364, which reads as follows:

"Sec. 7. That in time of war every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised."

The Question Stated.

It will thus be seen that the question is, To which of the three following rates of pay is the claimant entitled?

1. The pay of a second lieutenant, the rank actually held by him under his commission on September 14, 1898, when his regiment received the furlough of thirty days, of which he had no benefit (Finding IV, Record, pp. 4, 5.)

2. That of a first lieutenant, the rank actually held by him under his commission at the date of his discharge and muster out of the service.

3. That of a captain, the duties of which grade he was performing from August 26, 1898, to the time of his discharge and muster out (including the period of the nominal furlough), and the pay of which he has received during the time when he was performing its duties.

Right to Retain Pay for Exercising Higher Command.

While no set-off or counter-claim was filed by the United States, the Court of Claims also considered whether the Auditor of the Treasury for the War Department was justified in allowing to the claimant the pay of a captain during the period for which he exercised the command of a company appropriate to that grade.

The assignment of the claimant to the command of that grade was, as has been seen, by order of the commanding officer of the regiment, confirmed by that of the Major-General commanding the 4th Army Corps. The findings also show some general orders of the War Department. The first of these, dated July 2, 1898, requires that the assignment must be by written order of the commanding general in the field, or the Secretary of War. The second strikes out this requirement, and, following the language of the statute, merely requires that the officer be so "assigned in orders issued by competent authority." (Record, p. 4.)

It is also found that the Treasury Department, from March 31, 1899, to May 25, 1903, recognized orders such as those shown in this case as sufficient authority for granting the higher pay.

All officers were paid either by the Pay Department of the Army or by the Treasury Department on claims pre-

sented after the war under orders similar to those shown in this case. (End of Finding II, Record, p. 4.)

Judgment and Appeal.

The Court of Claims gave judgment in favor of the claimant for one month's extra pay at the rate of a captain mounted, $166.66. This is the rate to which the claimant was entitled, and which he actually received, at the time of his muster out as well as at the time when the furlough of thirty days was granted to his regiment, during which the claimant himself was held to duty. The opinion, Record, pp. 5 to 9, is reported 41 C. Cls. 36. From this judgment, the United States appealed.

II. Brief of Argument.

The Case is Within the Statute.

The right to some extra pay is conceded, and the question is, what is the proper rate? The answer of the Court of Claims is that it shall be the rate to which the claimant was entitled and which he received at the time of his muster out and discharge from the service as well as for about two months previous. This includes the time during which his regiment was nominally on furlough, while the claimant was held for active duty and actually discharged duty as the commanding officer of the company.

This conclusion is in accordance with the law whether the rate properly allowable be that of the pay to which the claimant was entitled at the time of his muster out and discharge from the service, as this court decided in the case of the similar statute passed for the Mexican War, in *United States* v. *North*, 112 U. S. 510, affirming 19 C. Cls. 254, or whether the proper rate of pay be that to which he was entitled during the nominal furlough of his regiment, as decided by the Court of Claims under these statutes in *Terrell* v. *United States*, 40 C. Cls. 78.

The Position of the United States.

It is insisted on behalf of the United States, that the claimant did not, during any portion of the time in question, while "operating against an enemy," "exercise, under assignment in orders issued by competent authority a command above that pertaining to his grade," and that he was therefore not "entitled to receive the pay and allowances of the grade appropriate to the command so exercised," under the act of April 26, 1898, § 7, 30 Stat. L. 364, quoted *ante*, p. 5.

The particular defenses raised by the Government are (1) that the service rendered was not with troops "operating against an enemy," (2) that the officer did not exercise "a command above that pertaining to his grade," and (3) that he had no "assignment in orders issued by competent authority." These views will be taken up severally in detail.

Troops Operating Against an Enemy.

The service was in time of war. The troops with which the claimant was serving were assembled at a camp within the limits of the United States for the purpose of operating against the enemy.

This, according to the opinion of Attorney-General Griggs, contemporaneously rendered to the Secretary of War (June 17, 1898), and ever since consistently acted upon, brought the officer so serving within the condition of the statute. The Attorney-General says (22 Opinions of Attorneys-General, 96, 97):

"It would be unjust to interpret the phrase 'every officer serving with troops operating against an enemy' as applicable only to operations in the immediate presence or even the near neighborhood of an enemy. It would be equally unjust to restrict its meaning to the operations of an actual campaign, even though the movements of

the troops to points of rendezvous before embarkation for hostile territory were counted as properly a part of campaign movements, which unquestionably they are.

"I think the clause in question was intended to apply to all instances where the troops of the United States are assembled into separate bodies, such as regiments, brigades, divisions, or corps, for the purpose of carrying on and bringing to a conclusion the war with Spain. If the operations of the troops are with the direct object of assisting in the military measures of the Government for subduing the forces of Spain, they can, within the reasonable intendment of this act, be considered as operating against an enemy, although such operations may not be direct but are in the nature of necessary component steps, though remote, in one great military objective."

And again, pp. 97, 98:

"If the principles I have above laid down as governing the construction of this law are sound, then it is immaterial whether or not there is within our borders any enemy to operate against. There is an enemy, and whatever military operations are carried on, whether in the United States, or in Cuba, or in the Philippine Islands, or upon the high seas, designed as a part of the war measures against Spain, are operations against the enemy. The Army of the United States is just as truly operating against an enemy when en route to a rendezvous, such as Camp Alger, near Washington, or at Tampa, in Florida, as when embarked on transports for a campaign in Cuba.

It would be very difficult to make up the pay rolls if it were held that one rate of compensation is due to officers when the enemy confronts them in the field, and a less rate from the very moment that a hostile army has disappeared from their front. The rate of pay upon such a construction as that would differ from day to day.

I think, also, that while assembled at camps in the United States such as I have named, any troops of the Army assembled for the present war purposes can properly be considered as operating against an enemy, although their present service is confined to the ordinary routine of camp life, drill, discipline, and other preparation. The as-

sembling of such troops, their drilling, disciplining, and equipment, while assembled into military bodies, are all a part of the same general war purpose."

This construction of this statute by the Attorney-General was followed in the practical administration of the law in payments by officers in the field. It was adopted by the Controller of the Treasury. All officers otherwise within this statute have been paid under this construction. Over eight years have now elapsed since these payments were made and nearly all possible claims arising under the law have been settled.

There has thus been a contemporaneous and continuous construction of the statute. To reverse this construction as the Government now contends at this late day, would be to overturn thousands of settlements already made. This would result most unequally. Officers of the Regular Army or others having pending or future claims against the United States would be charged by the accounting officers of the Treasury with the amounts paid under the former construction and these amounts would be deducted from current or back pay due them. Volunteer officers who have no reason for applying to the Treasury Department for future payment of claims would retain the amounts already received by them. A refund of the sums already paid under the construction of the law made by the Attorney-General, adopted by the Controller, and continuously followed in practice, would of itself be a hardship. It would be a grave injustice in this case, since the rule could not be uniformly followed in regard to all persons affected by it.

This court has repeatedly pronounced upon the force to be given to contemporaneous and continuous construction. In *United States* v. *Moore*, 95 U. S. 763, the court said:

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. *Edwards* v. *Darby*, 12 Wheat. 210; *United States* v. *The State Bank of North Carolina*, 6 Pet. 29; *United States* v. *McDaniel*, 7 *Id.* 1. The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

In *United States* v. *Alabama Railroad Company*, 142 U. S. 621, the court said:

"We think the contemporaneous construction thus given by the executive department of the Government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizens should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the Government. These principles were announced as early as 1827 in *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 210, and have been steadily adhered to in subsequent decisions. *United States* v. *State Bank of North Carolina*, 6 Pet. 29, 39; *United States* v. *Macdaniel*, 7 Pet. 1; *Brown* v. *United States*, 113 U. S. 568; *United States* v. *Moore*, 95 U. S. 760, 763."

See also *United States* v. *Finnell*, 185 U. S. 244.

The application to the present case of the doctrine announced in these cases requires adherence to the construction of this law announced by the Attorney-General in 1898.

Command Above His Grade.

The troops being thus "operating against an enemy," "in time of war," the question remains whether the officer who is claimant in this case "exercised under assignment in orders issued by competent authority a command above that pertaining to his grade."

Clearly, the command was "above that pertaining to his grade." He was only a second lieutenant, the lowest grade of commissioned officer, and for a short time before his discharge from the service, a first lieutenant; but he was, at the time of his muster out and for about two months previous, in actual command of his company, a command appropriate to the grade of captain, as shown by Section 14 of the Army Regulations quoted in the brief for the United States, page 8.

Assignment in Orders.

The statute says that the higher command must be "exercised under assignment in orders issued by competent authority." The defendants here raise the principal issue in this case and maintain that although orders were issued by competent authority for his assignment to the higher duty, he is not entitled to the higher pay, because the same command would have been exercised by him without the issuance of these orders.

There can be no question that there was a complete literal compliance with the statute. His assignment to the command of the company was made "in orders" of the most formal and peremptory character first issued by the commanding officer of his regiment and

subsequently confirmed by the major-general commanding the corps. (Record, pp. 2, 3.) He thus comes within every condition of the statute.

The claimant exercised a higher command, and he exercised it under orders issued by competent authority, and this is sufficient. As was said by the Court of Claims in a case arising in the Navy under the same statute:

"The statute was intended to encourage officers to hazard greater responsibility in time of war by promising them the pay and allowances of the grade appropriate to the command they might exercise above that pertaining to their respective grades." *Thomas* v. *United States*, 39 C. Cls. 1, 9.

There is no need here for interpretation or construction of the statute. The language is plain and unambiguous. The questions are whether there was an assignment in orders, and whether these orders were issued by competent authority. The orders are here under unquestionable authority. The will of Congress expressed in the statute is therefore met and the right to higher pay follows.

This court said in *Lake County* v. *Rollins*, 130 U. S. 671:

"Words are the common signs that mankind make use of to declare their intention to one another; and when the words of a man express his meaning plainly, distinctly and perfectly, we have no occasion to have recourse to any other means of interpretation."

The same idea is elaborated, *Dewey* v. *United States*, 178 U. S. 510, 520, 521:

"Of course, our duty is to give effect to the will of Congress touching this matter. But we must ascertain that will from the words Congress has chosen to employ, interpreting such words according to their ordinary meaning as well as in the light of all the circumstances that

may fairly be regarded as having been within the knowledge of the legislative branch of the Government at the time it acted on the subject."

* * * * * * *

"Here, the language used by Congress is unambiguous. It is so clear that the mind at once recognizes the intent of Congress. Interpreted according to the natural import of the words used, the statute involves no absurdity or contradiction, and there is consequently no room for construction. Our duty is to give effect to the will of Congress, as thus plainly expressed. *United States* v. *Fisher*, 2 Cranch, 358, 399; *Lake County* v. *Rollins*, 130 U. S. 662, 670."

There is nothing in the general intent of this act to require a construction other than that authorized directly by its terms. The hardship of the pre-existing law was that an officer might exercise the duties of a higher command and receive the pay appropriate to less responsible duties. To make the remedy commensurate with the mischief, every officer when exercising a command above his grade should have the pay of the higher command.

The first decision of the Controller of the Treasury, quoted hereafter, pp. 18, 19, gave to the law this complete remedial effect, holding that the general provisions of Army Regulations, conferring command upon the senior officer present in the absence of the appropriate commander, was a compliance with this statute.

He later ruled—and we need go no further for the purposes of this case—that the remedy intended by this statute did not extend to the exercise of brief or casual periods of higher command where the appropriate superior found it unnecessary to issue a particular order therefor. He held that the intent of the statute was fulfilled and its terms literally complied with by giving the higher command pay only when a special order was

issued by proper authority for the exercise of the higher command.

Either of these decisions is reasonable and either carries out the general intent of the statute. That general intent is defeated by a construction which denies higher command pay to all officers exercising higher command under orders unless they can show that it would not have been exercised by them without such orders.

The Defendant's Position.

The only ground suggested against the right to the higher pay is that, in the absence of the captain and first lieutenant, the claimant, as second lieutenant, would have succeeded by virtue of his office, to the command of the company without any special assignment to that duty, and that the assignment was therefore unnecessary.

This defense was suggested by an *obiter dictum* of the Court of Claims in the case of *Humphreys* v. *United States*, 38 C. Cls. 689. That case involved only the question whether a major could receive higher pay for exercising the command of a lieutenant-colonel. The court decided that he could not, a conclusion resting upon the fact that under section 14 of the Army Regulations quoted in the brief for the United States, p. 8, there is no difference between the commands of those two grades.

The court took the position, unnecessary to the decision of that case, that "orders" in the act of 1898 means only such orders as would be absolutely necessary to authorize an officer to take the higher command. Orders issued by a superior in the exercise of his discretion naming the senior officer present for the higher command, are held not to be "orders" contemplated by the statute. An assignment by such orders, it held, gave no right to additional pay, since the higher command would

have been exercised without such orders. The court's opinion is quoted in the defendants' brief, p. 16.

There are two objections to this theory of the law.

The first is that there is nothing in the statute which warrants it. The test exprest in the statute is the existence of orders. The only implied condition is that the orders must be lawful. Their propriety under existing military conditions in any given case is a matter of discretion in the military officer. Whenever the higher command exercised by an inferior officer continued so long, or such other conditions existed, as to make orders proper in the view of the superior officer, then, the statute says, the higher pay must be allowed. When the duration of a command was so brief, or the conditions otherwise such, that an order was not deemed essential by the superior officer, then the higher pay is not granted. The right to the higher pay is made dependent by the statute upon the issuance of lawful orders. It authorizes no inquiry into the administrative or military propriety of their issuance.

The Controller of the Treasury in his first decision under this statute (5 Cont. Dec. 639, quoted, *post*, pp. 18, 19) declared a more liberal rule than this. He held that even if a subaltern exercised the command of his company without any special assignment under the general provisions of Army Regulations, he would still be entitled to the higher pay. The intent of the law awarded the higher pay for the increased responsibility of higher command when exercised by proper authority, whether exprest in a particular order or in a general regulation. The exercise of a higher command merely by virtue of the general provisions of regulations is a compliance with the requirement of the law that the exercise must have been "in orders issued by competent authority."

While it is true that the command of the company in the absence of the captain, devolves upon the subaltern next in rank who is serving with it (Army Regulations of 1895, par. 253), unless otherwise specially directed, it is, nevertheless, not usual and not in accordance with the best military practice for such temporary command to continue for periods of any great length without special assignment in orders. Whether such orders shall be issued or whether the assignment shall be left to devolve upon the subaltern merely by virtue of his rank are questions of administration on which courts will not overrule the action of the administrative authorities without some special reason for so doing.

The second reason against the government's position is that the adoption of such a rule would leave practically nothing for the operation of this statute. It is a very unusual military condition for an officer to be ordered to any command, even temporarily, which he would not exercise in order of seniority. The military rule is that when the commanding officer is absent the senior officer present takes command. A junior officer is practically never assigned to command over his senior officer; nor are company, regimental or brigade officers often transferred to other commands for the purpose of superseding the senior officer there present. Such a condition would arise only in case of gross incompetency and would necessarily involve censure.

The frequency with which the command is conferred by orders upon the senior officer present as a matter of military administration may be seen by the cases decided by the Controller and by the Court of Claims as reported. Payments were authorized to lieutenants commanding their own companies and batteries by the Controller, 6 Cont. Dec. 187, 7 Cont. Dec. 475, and to captains commanding battalions in their own regiments, 9 Cont. Dec. 528.

This very case illustrates the same principle.

The fact of seniority appears on the record in the case decided by the Controller, of John T. Martin, First Lieutenant of Artillery in command of battery, 6 Cont. Dec. 187. In the case of Colonel William J. Glenn, who was paid as Brigadier-General, by judgment of the Court of Claims (*Glenn* v. *United States*, 37 C. Cls. 254), the order itself recites that he is assigned to the command of the regiment because he is the senior colonel present.

It is surely not necessary in order to entitle an officer to increased pay for exercising a command above that pertaining to his grade, that the command shall be one outside of his own company or regiment, or that he shall, contrary to all military usage and tradition, be assigned to command over an officer superior in rank to himself. The statute must be interpreted in accordance with military usage.

Practice Under This Statute.

The Controller of the Treasury considered the question whether an officer succeeding to a command by virtue of his office under the Army Regulations, without any special order, would thereby become entitled to the increased pay for exercising a higher command. This is the decision of the Controller of March 31, 1899, referred to in the concluding paragraph of Finding II in this case, Record, p. 4. He said (5 Controller's Decisions, 642):

"While the question whether the exercise of a higher command in accordance with law and the general regulations issued in pursuance thereof could be regarded as an exercise of the command 'under orders issued by competent authority,' within the meaning of the act, was not specially discussed, it was covered, in principle, by the decision that the form of the order is not material, but that 'it must be an order which the subordinate officer was bound to obey.'

"Except as they embody law, the Army Regulations

now in force are substantially a compilation of general orders.

"If, therefore, an officer of a certain grade is required by the Army Regulations, upon a specified contingency, to assume and exercise a command above that pertaining to his grade, I am of the opinion, coinciding with the views of the Acting Judge-Advocate, that while exercising such higher command he must be regarded, under the law, as exercising it 'under assignment in orders issued by competent authority.'

"If the general order clearly requires a particular officer to exercise the higher command, it has the same effect as a special order assigning him to the command by name." (5 Controller's Decisions, 642.)

This decision is right, altho this case does not require so broad a rule.

In a later decision of February 27, 1901, 7 Controller's Decisions, 469, 470, the Controller modified this ruling, by holding express orders in the particular case to be necessary to the operation of the statute. He says (7 Cont. Dec. 469–70):

"It is perfectly clear to my mind that Congress intended to attach a substantial meaning to these restrictive words —in fact, the most restrictive clause in the entire act—and that its meaning does not appear to be difficult to arrive at. It is that when an officer is absent, and the officer having authority to designate another officer to temporarily fill his position determines that the absence is of such a character as justifies an official filling of the position so temporarily vacant, and does so fill it by ordering some other officer to exercise the command, then the requirements of this clause of the law have been fulfilled."

The Court of Claims itself decided a case on the same principle, that of *Glenn* v. *United States*, 37 C. Cls. 254, where the claim was that of a colonel for the pay of a brigadier-general by virtue of commanding his own brigade, he being the senior officer present.

Under these decisions, all officers exercising similar commands were paid at the rate appropriate to the higher grade, either by the pay department of the Army, or through the proper accounting officers of the Treasury. (Concluding sentence of Finding II, Record, p. 4.)

These rulings remained in force, and nearly all officers entitled had been paid under them when, on May 25, 1903, the Court of Claims in the course of its opinion in the case of *Humphreys* v. *United States*, 38 C. Cls. 689, used the language quoted in the brief for the United States, p. 16, which threw some doubt in the minds of the accounting officers upon the correctness of nearly all payments made under the act.

The Court of Claims, in its opinion in this case, has receded, we submit, very properly, from its dictum in the Humphreys case, and has returned to the rule enunciated by the Controller in 1899, and steadily acted upon for the four years following.

These circumstances bring the case amply within the rule of contemporaneous construction announced and acted upon by this court in *United States* v. *Finnell*, 185 U. S. 236, 243, 244, and numerous cases there cited. To overturn that construction at this late day and require the repayment of pay received in good faith for services rendered in a higher grade by a large number of officers would work great injustice.

Authorities for this Construction.

There have been decisions under several previous statutes of similar character as well as decisions under this very statute. To these we will now refer.

Attorney-General Wirt, construing in 1821 an act allowing pay to brevet officers "when on duty and having a command according to their brevet rank," held that a brigadier-general holding a commission as brevet major-

general, was entitled, while commanding a division, the appropriate command of a major-general, to major-general's pay, and this altho the general officers of the Army at that time were only one major-general and two brigadier-generals. He hence held that as both of the brigadier-generals were commanding divisions, they were entitled to major-generals' pay. 1 Opinions of Attorneys-General, 525.

This view was reaffirmed in 1836 by Attorney-General Butler, 3 Opinions Attorneys-General, 83.

Attorney-General Cushing in 1853, thus treated the objection suggested by the Court of Claims as quoted in the brief for the United States, p. 19, that the law permitted duplication of pay:

"The acting Paymaster-General assumes that the paragraphs 1247 and 1253 of the Regulations for the Army, with the fact that General Harney was, for the time being, in command of the Eighth Department, preclude General Smith from receiving pay and emoluments according to his brevet rank of major-general: to which the late Secretary of War adds another suggestion, that the two officers, General Smith, as brevet major-general, and General Harney, as brevet brigadier-general, can not both receive brevet pay for the same command at the same time.

"I do not regard the latter consideration as being entitled to the weight assigned to it, apparently, in the mind of the Secretary. The two persons are distinct, and so are their commissions, their grades, and their services. There is nothing of legal incompatibility in the idea that both may be in command at the same time in the same military department, and each entitled to his appropriate pay and emoluments, according to their relative grades and ranks in the Army. Even in civil employments it often has happened, and must oftentimes happen again, that two different persons will be, at the same period, in the same office temporarily, and each entitled to the salary established by law for the same office. It must of necessity be so in a territory so extensive as that subject to the

jurisdiction of the Government of the United States. Otherwise, there would, from time to time, arise absolute cessation of government, as while a territorial governor, judge, or marshal, or a foreign minister is in transit from the place of appointment to the place of service. There is no act of Congress to preclude this, and the very contingency has been considered, and the legality of such a temporary duplication of officer and salary affirmed, in the courts of the United States. (*Bowerbank* v. *Morris*, Wallace, p. 124.)" 6 Opinions, 214.

By act of March 2, 1827, 4 Stat. L. 227, it was provided:

"That every officer in the actual command of a company in the Army of the United States shall be entitled to receive $10 per month additional pay as compensation for his duties and responsibilities," etc.

This act was recognized by Congress as in force during the Civil War by the Act of June 15, 1864, 13 Stat. L. 127, but seems to have been omitted from the Revised Statutes, being probably regarded as superseded by the general terms of the new pay table contained in section 24 of the Act of July 15, 1870, 16 Stat. L. 320.

There is a long line of departmental decisions under this act as well as under the one giving the higher pay to a brevet officer when exercising command according to his brevet rank, Digest Second Controllers' Decisions, Vol. 1 (1817–1869) §§ 1176–1205, Titles, "Allowance to Commanders of Companies" and "Brevet Pay." All of them hold the statute satisfied by an exercise of the command by proper authority general or special.

The statute of 1898 giving increased pay for exercising a higher command is thus simply in line with a general policy of long standing exprest, as has been seen, in several different statutes.

Conclusion.

For the reasons stated, the judgment of the Court of Claims should be affirmed.

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